SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 321

SHREVEPORT ENGRAVING COMPANY, INC.,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF

BEN F. ROBERTS,
Of Counsel.

FRANK J. LOONEY,
Attorney for Petitioners.

INDEX

CASES CITED

STATUTES CITED

CONSTITUTIONAL PROVISIONS CITED

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PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

The Shreveport Engraving Company, Inc., defendant in the District Court of the United States for the Western District of Louisiana, and appellant in the United States Circuit Court of Appeals, Fifth Circuit files this its petition and prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals,

Fifth Circuit, affirming the judgment of conviction of petitioner, entered by said Court on June 1, 1944, and made final therein by denial of rehearing on July 7, 1944, R. 447.

OPINION BELOW

The opinion below is unpublished, but appears on pages 424-436 of this record.

JURISDICTION

The case involves questions of administrative and criminal law and the attitude of the presiding judge in the District Court toward defendant and the president of the defendant Company, a witness, who testified for said defendant Company, and the decision of the Circuit Court of Appeals is final, unless review is ordered by this, the Supreme Court of the United States.

It is contended, that jurisdiction to review is vested in this Court under section 347 (a) of Title 28 of the United States Code. See United States versus Gulf Refining Company, 268 U. S., 542.

STATUTE INVOLVED

The Statute involved is Section 2(a) of the Act of Congress of March 27, 1942, known as the Second War Powers act, and a directive, known as M-9-C, issued and signed by an enployee of the War Production Board and published in the Federal Register.

The charge made in the information, filed by the United States Attorney for the Western District of Louisiana, is that the defendant Company used and processed an excess of copper over the allowed proportion, based on the Com-

pany's use of copper for a preceding period. R. 27.

Demurrer and amended demurrer were filed and overruled, R. 10 and 12.

The case was tried by jury and verdict of guilty on two counts and not guilty on one count was returned November 24, 1943, R. 416.

The evidence showed that defendant had on hand more than enough copper to meet its requirements during the periods covered in the information, R. 380, that there was no limitation on buying of copper sheets from any one or selling to any one, when in the original sheet state.

And that when used, copper must be scrapped and sold to a scrap dealer for a low price; see directive M-9-b, War Production Board, R. 392-5. Whereas the value of the original sheets was so high per pound as to make its expropriation by the government undesirable and unrequired. R. 360, 366.

That the directive was carried out in an arbitrary and discriminatory manner, and the trial court denied defendant the right to go into this, R. 45-58-62-70-71.

Motion for a directed verdict was presented at the close of the government's evidence and at the close of all the evidence. R. 75 and 317.

Motion for a new trial having been filed was everruled December 27, 1943, R. 418.

Appeal was duly taken and bond filed December 30, 1943, R. 406-407.

The case was heard in Circuit Court of Appeals and judgment rendered, June 1, 1944, R. 437.

Motion for rehearing was duly and timely filed and denied July 7, 1944, R. 447.

QUESTIONS PRESENTED

By the 2nd War Powers Act, section 2(a), Congress empowered the President to allocate materials "for defense, for private account and for export."

In doing this did Congress authorize the president through others to confiscate elements of ownership in materials, where the specific materials were not alloted to defense?

Did the authority vested in the president include the power of delegation to the head of an executive agency under the terms of the statute and authorize the exercise of presidential power by such departmental agency or officer of the government, as he may direct, when the head of the department named by him in his executive order was not an officer of the government, as contemplated by the Federal Constitution in article 2, section 2, clause 2, but was merely created by an Executive order?

If such delegation could be made to the chairman of the War Production Board, as the representative of a government agency, could the power be re-delegated to an employee of said board?

Does the publication of rules and regulations in the Federal Register over the signature of a mere employee comply with the statute?

Can such rules and regulations limit the use of materials, in this instance copper, where such copper is not allocated to national defense, but is kept unusable in the hands of its owner, a photo engraving company, when it is not available to or availed of by the government on account of intrinsic value; but if used by the photo-engraving company, and becoming scrap must be sold to "scrap dealers' and then becomes subject to defense uses in its cheapened form?

Has the trial judge the right in the presence of the jury to ask questions of defendant's president, while on the witness stand, which tend to cast aspersions on his patriotism, his intelligence and his business capacity and to say the defense is "a sub rosa defense" and in addition to this to exaggerate or distort the evidence?

REASONS FOR THE WRIT

Under the position taken by the trial court and sustained by the Court of Appeals, power is vested in an executive agency to confiscate an element of ownership, namely the use of its own copper, in its own business, when the copper is not allocated by the government to its defense and no compensation is allowed defendant for the deprivation of ownership in violation the 5th Amendment to the Constitution, and such a construction can not be placed on the statute here considered, when only the power to "allocate" is given and the decision is in conflict with Stark et als. vs. Wickard, No. 211, October term 1943, decided February 28, 1944, wherein the Supreme Court said,

"When Congress passes an act empowering administrative agencies to carry on Governmental activities, the

power of these agencies is circumscribed by the authority granted."

Whereas the Office of Price Administration has been especially recognized by Congress and its Director has been named in an act of Congress, the chairmanship of the War Production Board is merely an administrative operation and is not mentioned in the statutory language referring to departmental officer or agency.

The delegation of power by the President to the chairman of the War Production Board was personal and could not be re-delegated to an employee of the Board inasmuch as the power of appointment of even inferior officers is "in the President alone" in the Courts of law or in the heads of departments and the decision below conflicts with Ekieu vs. United States, 146 U. S. 651.

The position taken by the Courts below conflicts with the Supreme Court's declaration in Steuart & Bro., Inc. vs. Bowles, No. 793, October term 1943, decided May 22, 1944, wherein it was said "if petitioner establishes that he was eliminated as a dealer or that his quota was cut down for reasons not relevant to allocation or efficient distribution of fuel oil, quite different considerations would be presented."

The approval by the Circuit Court of Appeals of the conduct and utterances of the trial judge conflict in toto with the rulings of this, the Supreme Court in Quercia vs. United States, 289, U. S. 470.

Transcript of record is attached hereto and made a part hereof.

Wherefor, your petitioner respectfully prays, that a

writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify, on a day certain to be therein named, the full and complete transcript of the record and all proceeding in the cause numbered and entitled on its docket No. 10,924, Shreveport Engraving Company, Inc., appellant vs. United States of America, appellee, and that said judgment of the United States Circuit Court of Appeals for the Fifty Circuit may be reversed by this Court and that your petitioner be discharged without delay and have such other and further relief in the premises as this Honorable Court may deem just and proper.

FRANK J. LOONEY,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

JURISDICTION

The matters herein involved are the construction of a criminal statute and of a directive and of the conduct of a trial judge. Jurisdiction is invoked under U. S. Code Title 28, Section 347 (a) and Supreme Court Rule, Number 38, Paragraph 5(b).

STATEMENT

The Shreveport Engraving Company was charged in an information filed in the U. S. District Court for the Western District of Louisiana—with violating Conservation Order No. m-9-c, which order among other things, limited the use of copper and copper products in photo engraving as follows:

> "(a) In the last quarter of 1942, to 70% of the total usage in the last quarter of 1940."
>
> "(b) In each subsequent quarter—to 60% of the total usage in the corresponding quarter of 1940."

This directive was signed "J. S. Knowlson, Director of Industry Operations."

An amendment directive was signed "Ernest Kanzler, Director General for Operations."

These orders speak for themselves and show no other authority than as above shown in their published form in

the Federal Register, of which the Court takes judicial notice.

In the amended directive the right of appeal was given to those denied the use of copper above the quotas above shown.

The Engraving Company sought through every source provided by the War Production Board for permission and contended that permission had been orally granted to use copper in excess of above quotas.

In the amended m-9-c, Section (h) (2) the power to grant relief is specifically given and the Section reads in part—"Relief granted pursuant to an appeal under this order shall remain in effect despite any amendmeent to this order, unless the relief is specifically revoked or modified by the Director General for Operations."

Since the order was promulgated by this Director General for Operations over his signature the arbitrary power given to himself is evident.

When defendant attempted to show the arbitrary use of power in the Copper division of the War Production Board, the trial judge sustained an objection made by the government to this evidence. R. 71.

The evidence showed that the Engraving Company had more than enough copper on hand January 1, 1942, to cover the use of copper during the two quarters named in the Information. R. 380.

Also that the Photo-engravers polished sheets cost 49c per pound, R. 360, 366.

When turned into "scrap" the owners received 5c to 8c per pound. R. 392-5.

Conservation order No. m-9-b requires "scrap" to be delivered to a scrap dealer or a person authorized by the "Director General of Operations" and requires a report on all "scrap" accumulated above 500 pounds per month and delivery after 30 days to a scrap dealer of all scrap aggregating a ton; the "Information" shows accumulation by the Engraving Company of greater amounts during each quarterly period. R. 7, 8.

The record disclosed the attitude taken by the trial judge throughout the trial as hostile to the accused.

THE STATUTE INVOLVED

Second War Powers Act Sec. (2) (a) (2):

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." (a) (2).

ASSIGNMENT OF ERRORS

I

The Court erred in holding that allocation includes freezing copper in the hands of the owner and thus withholding it from defense uses.

II

The Court erred in holding that the President could assign his authority, to make rules, to the chairman of the

War Production Board, who in turn could redelegate the power to a mere employee.

III

The Court erred in holding such employee could over his own signature issue directives, the violation of which would incur penalties.

IV

The Court erred in holding that there was a fair trial, when the trial judge repeatedly showed hostility to the accused and its witnesses and made evidentiary statements, in the presence of the jury, contrary to the evidence and harmful to the accused.

ARGUMENT

The cited statute, Sec. (2) (a) 5, provided punishment for "willful" violation of the act; or "any rule, regulation or order thereunder."

The government must concede that rule, order or regulation must be within the authority of the statute.

Petitioner relies on the words of the statute which authorize allocation by the President of material for defense, and since the evidence shows that the copper used by petitioner was not allocated for defense but on the contrary was not available for defense purposes until used and converted into "scrap," that no rule of any agent, officer or agency, or even of the President could make use of the copper sheets which did not destroy the copper or impair it so as to make it unfit for defense purposes, and only diminishes it in quantity by a very small percent, could subject petitioner to a criminal charge.

The government's witness, Palmer, the Deputy Director of Printing and Publishing of the War Production

Board during most of the time named in the Information, testified as to copper used in photo engraving:

"As a matter of fact, the turnover is the highest that we know of in any particular industry, because you do not actually consume it. Eventually it finds its way back to the scrap pile." R. 272-3.

It is thus made clear that the "freezing" of the copper sheets in their original form in the hands of the owner would defeat defense purposes, whereas the photo engravers use of copper, and subsequent scrapping advances defense purposes.

"The decisions of the Treasury Department applying these regulations have no more force than the reasons given to sustain them"—the Court said, p. 21—In Burnett v. Chicago Portrait Co. 285 U. S. 1.

Here the action being beyond reason, no attempt has been made to give reasons. The action of the employees of the War Production Board has been "one of unfettered discretion," a condition denounced as illegal by this Court in Panama Refining Co. v. Ryan 293 U. S. 388, 431.

In United States vs. Baltimore & Ohio Railroad 293 U. S. 454, 464. This complete absence of the basic or essential findings required to support the Commissioner's order renders it void."

In Manhattan General Equipment Company v. Commissioner of Internal Revenue 297 U. S. 129, 134, "And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable." Here it is neither.

Almost made for this case is the expression of the Court in Thompson v. Consolidated Gas Utilities Corporation 300 U. S. 55, when on pages 69-70, the Court said, "But obviously the proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights, or if shown to be otherewise arbitrary."

In considering a departmental regulation this Court said in Haggar Co. v. Helvering, 308 U. S. 389, on page 398, "as we have said the construction files in the face of the purposes of the statute and the plain meaning of its words."

This Court has been so consistent in denouncing arbitrary action, that it held in United States vs. Carolene Products Co. 304 U. S. 144, on pages 153-4. "Similarly we recognize that the constitutionality, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason." This was spoken not of a mere regulation, order, directive, or whatever it might be called originating in an Executive Agency, but of a Congressional Act.

In the very late case of Addison v. Holly Hill Fruit Products—No. 217 October term 1943, decided June 5, 1944, by the Supreme Court we find in the Text under headnote 2; "But when Congress wants to give wide discretion it uses broad language" and under headnote 5: "But it is no warrant for extending a statute that it should have been made more comprehensive."

We submit that the provisions of the directive under which the counts of the Information were drawn are, as applied to copper not allocated to defense purposes, unreasonable and arbitrary.

THE TRIAL JUDGE

The leading case on the right of comment by the trial judge is Quercia vs. United States 289 U. S. 466, decided by Chief Justice Hughes, who in reversing a conviction took occasion to chart the bounds of fair comments and laid down rules for trial judges, most of which were ignored by the magistrate who presided in this case.
The Supreme Court said, p. 470.

"His discretion is not arbitrary and uncontrolled but judicial, to be exercised in conformity with the standard governing the judicial office."

In this case the Trial Judge thus interrupted the cross-examination of P. E. Dozier, the President of the defendant company and its personal representative on trial, in this manner:

"Your business has been engraving for years—the business you ran? You knew there was a war going on didn't you?"

Witness: "My business is engraving, your honor."

The Court: "Did you know there was a war going on?" No standard governing the judicial office was followed there. R. 204.

The Supreme Court continued—"In commenting upon the testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not distort or add to it."

The trial judge below said: "Wait a minute, M-9-C, of course is equivalent of being a proclaimed law and a person engaged in the business of engraving copper, using

copper, and as the record shows, hundreds of thousands of dollars worth a year, he knows what M-9-C is, or otherwise he should not be in the engraving business or be an American Corporation. That is point No. 1, it strikes me."—R. 67.

The government offered evidence of the use of copper by the defendant. Government's exhibit 2, R. 353 and 354, showing a total of less than 13,000 pounds in the year in which the largest amount of copper was used which at 49 cents per pound, R. 199,255,256 would not equal seven thousand dollars "worth a year."

As a violation of the rule laid down by the Supreme Court, the trial court's words convict him.

The Supreme Court further said—"He may not charge the jury, upon a supposed or conjectural state of facts of which no evidence has beeeen offered."

Without any reason disclosed by the evidence, the Court said; "This is a sub rosa defense here." R. 216.

Again the Supreme Court said: "It is important that hostile comment of the judge should not render vain the privilege of the accused to testify, in his own behalf."

It will be noted that the remarks of the judge were made when the President of the Company, its physical representative in the trial was testifying.

As to the prejudicial language not herein quoted, we refer the Court to page 38 of the Record and to R. 166-68, wherein the Court gave expression to language that tenders to make the jurors believe that acquitting the defendant would be verging on an unpatriotic act.

We conclude with this quotation from the Quercia case made from the same page 470, as the others.

"The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should not be so given as to mislead and especially that it should not be one-sided.' That deductions and theories not warranted by the evidence should be studiously avoided."

We here call attention to the fact that defendant's president throughout contended that he was in good faith in believing he could use the excess of copper until July 1, 1943, without incurring the Board's penalties. R. 216, 217, 218.

It is respectfully submitted that the petition for a Writ of Certiorari be granted and that the Supreme Court of the United States should, should, after hearing, reverse the judgment of the United States Circuit Court of Appeals for the Fifth Circuit and dismiss the bill of Information filed below.

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FRANK J. LOONEY,
Attorney for Petitioner.

No. 321

In the Supreme Court of the United States

OCTOBER TERM, 1954

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 423–433) has not yet been reported. The statement of the trial judge, in passing sentence upon petitioner, appears at R. 340–343.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 1, 1944 (R. 434) and a petition for rehearing (R. 435–443) was denied on July 7, 1944 (R. 444). The petition for a writ of certiorari was filed on August 5, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by

the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the power to allocate critical materials includes the power to restrict the use of such materials already owned by a processor.

2. Whether General Conservation Order M–9–c, an order signed by a subordinate official of the War Production Board, was issued pursuant to an improper delegation of authority under the Second War Powers Act.

3. Whether four specified comments of the trial judge in the course of the trial constitute reversible error.

STATUTES AND REGULATIONS INVOLVED

The Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat 176, 50 U. S. C. App., Supp. III, 631, *et seq.*), provides in part:

> SEC. 2 (a) (2): * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall

deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

SEC. 2 (a) (5): Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

SEC. 2 (a) (8): The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Section 1 of the Act of June 11, 1942, 56 Stat. 451 (50 U. S. C. App., Supp. III, 1101), provides in part:

* * * In addition to the powers and duties of the Chairman of the War Production Board defined by Executive Order Numbered 9024 of January 16, 1942, and by Executive Order Numbered 9040 of January 24, 1942, it shall be the duty of the Chairman of the War Production Board, and he is hereby empowered, through a deputy to be appointed by him, to mobilize

aggressively the productive capacity of all small business concerns, and to determine the means by which such concerns can be most efficiently and effectively utilized to augment war production.

By Executive Order No. 8629, dated January 7, 1941 (6 Fed. Reg. 191), the President conferred his power under Section 2 (a) of the Act of June 28, 1940, on the Office of Production Management, and thereafter by Executive Orders Nos. 9024, dated January 16, 1942 (7 Fed. Reg. 329), 9040, dated January 24, 1942 (7 Fed. Reg. 527), and 9125, dated April 7, 1942 (7 Fed. Reg. 2719–2720), the President conferred his power under Section 2 (a) of the Second War Powers Act on the War Production Board. By Executive Order No. 9125, the President confirmed War Production Board Regulation No. 1 of January 24, 1942 (7 Fed. Reg. 562), which, *inter alia,* lodged in the Director of Industry Operations authority to perform all functions and exercise all powers under Section 2 (a) of the Act. By amendment on July 9, 1942 (7 Fed. Reg. 5395), of War Production Board Regulation No. 1, the authority in that respect was transferred to the Director General for Operations.

General Conservation Order No. M–9–c, issued and effective October 21, 1941 (6 Fed. Reg. 5394), as amended effective December 26, 1942 (7 Fed. Reg. 10927), prohibited, in paragraph (f) (1), all use of copper and copper base alloy engraving

plates for certain purposes after December 31, 1942, and limited other uses. Users in the photoengraving business, like petitioner, were permitted under this conservation order, to use during each calendar quarter of 1943 sixty percent of the amount of copper used by them during the corresponding calendar quarter of 1940.

STATEMENT

On October 26, 1943, petitioner, a Louisiana photoengraving corporation with its principal place of business at Shreveport, Louisiana (R. 173), was charged in an information in the District Court of the United States for the Western District of Louisiana in three counts with violating Section 2 (a) of Title III of the Second War Powers Act, and General Conservation Order M–9–c issued thereunder (*supra,* pp. 2–3, 4–5). Each count charged that petitioner willfully and unlawfully made a separate use and processing of copper in excess of the applicable quota prescribed by the conservation order for the printing and publishing industry (R. 2–9). Petitioner's demurrer was overruled by the trial judge (R. 9–15), and a jury thereafter found petitioner guilty on counts 2 and 3 and not guilty on count 1 (R. 337, 417). The trial judge fined petitioner $1,500 on each of counts 2 and 3 (R. 340–343, 419). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the conviction was affirmed (R. 423–434).

The evidence adduced at the trial in support of the information is, in summary, as follows:

In connection with its business of processing and selling copper photoengraving plates (see R. 173), petitioner, in anticipation of the present war and the possible consequent shortage of materials, accumulated a large surplus inventory of copper plates (R. 179, 180, 247, 253). After the outbreak of the war, petitioner's business increased substantially (R. 39–43, 178, 181, 190, 251–252). Following the issuance of the conservation order limiting the 1943 use of copper to sixty percent of that used in 1940 (*supra*, p. 5), petitioner, in an effort to obtain permission to use copper in excess of the allowable quantities, pursued and exhausted the prescribed, as well as other, appeal procedures before the War Production Board (R. 45–46, 49–50, 51, 52, 54–55, 195–196, 308, 310, 311, 314, 343–369). That agency denied to petitioner the requested permission for excess use of copper plate (R. 360–361, 366–367). Petitioner's president was expressly informed and understood that he and it could not exceed the quota without prior written permission (R. 57–58, 59–60, 218, 219, 238) and that if it exceeded the established quota without such prior approval, it would be doing so at its "own risk" (R. 238, 241).

Under the provisions of the conservation order, petitioner's maximum quota for the first quarter of 1943 was 1,829 pounds of copper, and for the

second quarter of 1943, 1,737 pounds (R. 39, 353).[1] During the first quarter of 1943 petitioner used 5,352 pounds, and during the second quarter 4,558 pounds of copper (R. 40, 191).

ARGUMENT

1. Petitioner does not deny that it grossly exceeded the quota fixed by Conservation Order M–9–c. Instead, its principal contention is that, as applied to it, the order is not an appropriate exercise of the allocation power and that it therefore is without legal foundation. Petitioner reasons thusly: It possessed a supply of copper sufficient to meet its needs during the period covered by the information. That copper was not available for any defense purpose until it had been used by it and then disposed of as scrap. Accordingly, the effect of the conservation order on it was to prevent the copper from being used rapidly and then made available to defense industry as scrap. In petitioner's view, allocation must be made for defense; since the effect of the operation of the limitation order on petitioner was to delay the movement of copper into use for defense production, the order did not allocate for defense and was therefore not an appropriate exercise of the power conferred by Section 2 (a) of the Act (Pet. 4, 5, 10, 11–13). We submit that

[1] These figures represented 60 percent of the copper used by petitioner during the corresponding quarters of 1940, which was, respectively, 3,065 and 2,896 pounds (R. 39–43).

petitioner misconceives the scope of the allocation power and that his contention therefore is without merit.

Section 2 (a) (2) of Title III of the Second War Powers Act, *supra,* confers upon the President the power to allocate scarce materials needed for defense, or for private account, or for export "in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." Contrary to petitioner's assertion (Pet. 4, 5, 11), the Act does not limit the power conferred to "allocation for defense," *i. e.,* solely in the sense of allocations for defense uses, but rather, once the need for allocation is found to exist, the power may comprehend control or regulation of the remaining supply in the public interest and to promote the national defense. In a recent construction of another aspect of the allocation power this Court spoke of it as follows (*L. P. Steuart & Bro., Inc.* v. *Bowles et al.,* No. 793, last Term, decided May 22, 1944):

> * * * Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. That power of allocation or rationing might indeed be the only way of getting the right equipment to our armed forces in time. From the point of view of the factory

> owner from whom the materials were diverted the action would be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims of preference. The waging of war and the control of its attendant economic problems are urgent business. * * *

We think it just as clear that it cannot be said that the President lacks power under the Act to conserve the nation's stock pile of scarce materials for the purpose of making it available for future distribution for essential use. The power to allocate scarce materials necessarily includes within it the power to control the use of those materials prior to such distribution as well as afterwards. Any other conclusion would, indeed, make the power to allocate an empty one in so far as the public interest and promotion of the national defense are concerned. In short, as the court below concluded (R. 425), we think it plain that Section 2 (a) has "a meaning wide enough to comprehend and bring within its effective scope both the distribution and the use of on hand materials essential to the war effort, without regard to whose hands they were in or whether they were being held for use or for sale."

The nub of petitioner's argument is that it should be treated differently from other non-essential users of copper because it acquired a supply of copper prior to the imposition of limi-

tations on its use. To the contrary there is no reason for such a differentiation. Even as applied to petitioner's situation, Conservation Order M–9–c is an effective instrument in accomplishing the statutory purpose. For by limiting petitioner's use of copper, its present stock pile is made adequate to meet its needs for a longer period than if it were permitted to use copper without restriction, and it is thus removed from the market as a buyer of copper and the nation's already inadequate stock pile is left available for more essential users. In addition, petitioner's unuseable stock pile of scarce copper is conserved for distribution to essential users either in the event requisitioning becomes necessary, or in the event peitioner decides to sell its excess supply. Thus just as the allocation power permits the exclusion of a wasteful conduit from the distribution of scarce commodities (*L. P. Steuart & Bro.* v. *United States, supra*), so, we submit, it permits restrictions on nonessential users for the purpose of preventing the dissipation of such scarce commodities.

2. Petitioner asserts[2] (Pet. 4, 6, 10–11), but does not argue, that the delegation of authority

[2] Petitioner also asserts (Pet. 3, 9), without supporting argument, that at its trial the court would not permit it to show that there was an "arbitrary use of power in the Copper Division of the War Production Board." But resort to the record references relied upon by it (R. 45–71) shows only that petitioner was not permitted to inquire into the decisions in thousands of appeals before the War Production Board, and

under Section 2 (a) of the Act, which eventuated in the issuance of the conservation order by the War Production Board's Director of Industry Operations, was improper in that the President could not delegate his authority to the Chairman of the War Production Board because he was an officer whose office was "merely created by an Executive order" rather than "an officer of the Government, as contemplated by the Federal Constitution in article 2, section 2, clause 2," and that, in any event, the delegate of the President's power had no authority to redelegate the power to the Director of Industry Operations of the War Production Board. Aside from the fact that these assertions are not supported by argument by petitioner, they are without merit.

That the President was not limited to delegating his power to any particular class of officers is clear from the specific provision in the first statute, the Act of June 28, 1940, 54 Stat. 676, as amended by the Act of May 31, 1941, 55 Stat. 236, that the President may exercise the power, au-

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was limited instead to establishing the facts relating to its appeals. The facts in respect of its appeals were fully brought out at the trial and they showed that those appeals had been fully considered, that petitioner was accorded a hearing, and that the denial of the appeals was based on reason. In the circumstances, we submit that, as the trial judge held (R. 71, 73), the results in thousands of other cases none of which were shown to have any factual resemblance to petitioner's appeals, had no probative value in showing whether petitioner's appeals had been treated arbitrarily and that the court properly sustained government counsel's objection (R. 70–72) to such an inquiry.

thority, or discretion conferred on him through such department, agency, or officer of the Government as he may direct. In vesting the Chairman of the War Production Board with authority to exercise his allocation power (Executive Orders Nos. 9040 and 9125, *supra,* p. 4), the President authorized the Chairman to carry out his functions "through such officials or agencies and in such manner as he may determine, and his decisions shall be final." The Chairman, in the exercise of the discretion conferred upon him, delegated his allocation power to the Director of Industry Operations (see *supra,* p. 4.) Subsequent to these delegations Congress reenacted, with certain additions, in Section 2 (a) of the War Powers Act, the authority it had granted in the earlier Act, and it again authorized the President to exercise his authority through any agency, department, or officer of the Government. This reenactment was made with knowledge of the prior Presidential delegations.[3] Thereafter, in the Act of June 11, 1942, *supra,* p. 3) Congress specifically recognized and adopted Executive Orders Nos. 9024 and 9040 (*supra,* p. 3), in which the President made the basic delegations of au-

[3] On February 2, 1942, the Chairman of the War Production Board, pursuant to Senate Resolution No. 195, 77th Cong., 2d sess., Sen. Doc. No. 161, submitted to Congress a full report as to allocation orders issued by the Office of Production Management, predecessor of the Board, through its subordinate officials and disclosed the new types of orders contemplated.

thority. Accordingly, it is clear that Congress contemplated such delegations and that they were proper in the first instance.[4] In addition, the subsequent legislation operated as a congressional ratification of the action taken. *Hirabayashi* v. *United States,* 320 U. S. 81, *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 301–302; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147; *United States* v. *Heinszen and Co.,* 206 U. S. 370, 382; *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226; *Hamilton* v. *Dillin,* 21 Wall. 73; *Prize Cases,* 2 Black 635, 671.

3. Petitioner attacks (Pet. 5, 6, 11, 14–16) the trial judge's conduct of the trial, and in support of its claim of reversible error it relies on four comments by the judge, divorced from their context. We think the contention is so lacking in substance as not to merit detailed examination of each statement. Rather, we submit that when the statements are restored to their context and viewed in their proper setting, and that when it is noted that out of a record of over three hundred pages petitioner has been unable to find anything more prejudicial than the comments in question, it is clear that there is no substantial basis for petitioner's contention. In the words of the court below (R.

[4] Cf. *United States* v. *Chemical Foundation,* 272 U. S. 1; *O'Neal* v. *United States,* 140 F. (2d) 908 (C. C. A. 6), certiorari denied, April 24, 1944, No. 795; *United States* v. *Randall,* 140 F. (2d) 70 (C. C. A. 2); *Gallagher's Steak House* v. *Bowles,* 142 F. (2d) 530 (C. C. A. 2).

424), "* * * the record leaves in no doubt: that the orders and directives were not complied with; that the trial was fairly conducted; that no evidence was admitted which should have been excluded, none excluded which should have been admitted; that the charge of the court fairly submitted to the jury, and the jury fairly determined the issues raised by, the evidence; * * *."

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 321

SHREVEPORT ENGRAVING COMPANY, INC.
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR REHEARING IN RE: SHREVEPORT ENGRAVING COMPANY APPLYING FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

FRANK J. LOONEY,
Attorney for Petitioner

BEN F. ROBERTS
Of Counsel:

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 321

SHREVEPORT ENGRAVING COMPANY, INC.
Petitioner,

versus

UNITED STATES OF AMERICA,

MOTION FOR REHEARING IN RE: SHREVEPORT ENGRAVING COMPANY APPLYING FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

In this case now comes the Shreveport Engraving Company, petitioner herein and defendant in the District Court and petitions this court to grant a rehearing on the petition for a writ of Certiorari heretofore filed in above numbered and entitled cause and denied by this court on October 16, 1944, and shows the following reasons:

I

Since the decision of this case by the Circuit Court of Appeals for the Fifth Circuit, the United States has prose-

cuted in the District Court of the United States for the Northern District of Illinois, the Turner Dairy Co. and one John Jurca for violating a directive issued under the War Food Administration.

After a plea of guilty, a motion to vacate was filed.

We here quote in full the opinion of Judge Barnes granting "the motion to vacate the judgment and the sentences imposed:"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA *vs.* TURNER DAIRY COMPANY and JOHN JURCA	Information No. 44 CR 70.

MEMORANDUM

The defendants, having previously submitted to the jurisdiction of this court and recognized the validity of the charges against them by entering pleas of guilty, now attempt, after sentence has been passed upon them, to attack the court's jurisdiction and the legality of the charges which they have admitted, through a motion to vacate the judgment entered and the sentences imposed.

The defendants make a number of points which the court thinks are without merit, but their challenge of the re-delegation by the War Food Administrator to the Direc-

tor of Food Distribution of authority to issue Food Distribution Order No. 79.7, gives the court pause. The court is of the opinion that justice will be done if a reviewing court is given an opportunity to pass upon the validity of that re-delegation of power before any citizen is required to go to jail for violation of Order No. 79.7.

Accordingly, the motion to vacate the judgment and sentences imposed is granted.

The court will assume that the defendants have demurred to the complaint, and the court sustains that demurrer and will dismiss the complaint.

Appropriate orders may be made at the opening of court on Monday, October 2, 1944.

(Signed): BARNES,
Judge.

September 27, 1944.

It is submitted that the present case is even stronger in that there is no evidence of a redelegation of the power to make rules and regulations, a power vested in the President by subdivision 8 of the Second War Powers Act, and not by Section 2(a) cited in government brief P. 4 filed in opposition to Petition for Certiorari.

It is further submitted that the cases of United States vs. George 228 U. S. 14 and Cudahy Packing Co. vs. Holland 315 U. S. 357, were of influence in securing the vacation of the plea of guilty and its effects, and especially the late language of the court in the latter case, p. 361: "a construction of the Act which would thus permit the administrator

to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words."

II

That petitioner herein is entitled to a hearing in this court inasmuch as the conviction in its case was not under the terms of a statute but of a mere directive of an administrative bureau subordinate official, which directive deprived it of the right to use in its own business material essential to the operation of its business; which material, to-wit, copper, was then and previous to the issuing of the directive, had been owned by defendant, and was susceptible of use by any other to whom it might be sold, even though that other were in a competing business, if that other were within the terms of this directive known as M-9-C, or had been granted the favor of using more copper than M-9-C itself purported to give defendant. Petitioner further shows that "use" has been recognized as "an attribute of ownership" by this court in Curtin vs. Benson S. 22 No. 78.86.

III

That petitioner herein is entitled to have this case heard by the Supreme Court of the United States, because the directive M-9-C, by prohibiting the use of the expensive copper sheets, prevented the conversion of these into "scrap" copper, which scrap became immediately subject to taking over by the United States for defense purposes whereas in the original expensive state no provision was made for purchase, hence none for defense use of this highly polished copper plate.

Petitioner submits that any regulation which prevented the use of copper plates which use would make the copper available for defense purposes was not only unreasonable but harmful to the nation at war.

IV

Petitioner shows that the intolerant attitude of the District Judge prevented a fair trial.

> That the taunting question, "You knew there was a war going on, didn't you?" made to the president and witness of the defendant company, not once, but twice, was intended to present the witness and through him, the defendant, to the jury as a person indifferent to the interests of his country at war, whereas the action of the company, in using the polished copper plate and turning it into scrap was evidence of the helpful knowledge of defendants president that he not only knew there was " a war on" but was serving the interests of this country at war.
>
> And that the interjection of the judge made categorically and hostilely, "This is a sub rosa defense here," threw suspicion on the defendant, its president and its counsel, in such an arbitrary and intolerant way as to cause wonder that intolerance in a judge was not included in Chief Justice Marshall's famous dectum: "The greatest curse an angry and indignant heaven ever inflicted on an ungrateful and sinning people is an ignorant, a corrupt or a dependent judiciary."

Petitioner submits that a fair trial means a fair judge presiding.

Wherefore this Honorable Court is requested to review the Petition for Certiorari and the Statute known as Section 2(a) and 8 of the Second War Powers Act, the direc-

tive M-9-C and the evidence as to the action and expressions of the District Judge and to grant a rehearing herein, or upon such reconsideration grant the writ of Certiorari hereinbefore prayed for.

FRANK J. LOONEY,
Attorney for Petitioner.

I certify that this motion is made in good faith and not merely to purposes for delay, this day of October, 1944.

FRANK J. LOONEY,
Attorney for Petitioner.

BEN F. ROBERTS,
Of Counsel.